RECORD AND 1 BRIEFS

FILED
NOV - 8 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-532

In the

# Supreme Court of the United States

CLAYVIN B. HERRERA,

*Petitioner*,

v.

STATE OF WYOMING,

*Respondent*.

**On Petition for Writ of Certiorari to the District Court of Wyoming, Sheridan County**

## BRIEF OF INDIAN LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

MONTE MILLS
*Counsel of Record*
Assistant Professor
ALEXANDER BLEWETT III SCHOOL OF LAW AT THE UNIVERSITY OF MONTANA
Missoula, MT 59812
(406) 243-2544
monte.mills@umontana.edu
*Counsel for Amici Curiae*

November 8, 2017

Library of Congress
Law Library

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii
INTEREST OF AMICI CURIAE ..... 1
SUMMARY OF THE ARGUMENT ..... 1
ARGUMENT ..... 2
I. Indian Treaties Establish the Foundations of Federal Indian Law. ..... 2
II. The Indian Canons of Construction Protect These Foundations. ..... 4
III. The Court Has Applied the Indian Canons of Construction to Limit State Authority Over Indians Exercising Reserved Treaty Rights to Hunt and Fish Off-Reservation ..... 6
IV. The Indian Canons of Construction Also Serve to Protect Important Aspects of Tribal Identity. ..... 10
CONCLUSION. ..... 16
APPENDIX
Appendix A
List of Amici Curiae ..... App-1

## TABLE OF AUTHORITIES

**Cases**

*Antoine v. Washington*,
420 U.S. 194 (1975) ..... 5, 7, 8, 9

*Cherokee Nation v. Georgia*,
30 U.S. 1 (1831) ..... 2, 3

*Crow Tribe of Indians v. Repsis*,
73 F.3d 982 (10th Cir. 1995) ..... 17

*Department of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44 (1973) ..... 7

*Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) ..... 16

*Jones v. Meehan*, 175 U.S. 1 (1866) ..... 4

*McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973) ..... 5

*Michigan v. Bay Mills Indian Cmty.*,
134 S. Ct. 2024 (2014) ..... 3

*Minnesota v. Mille Lacs Band of Chippewa Indians*,
526 U.S. 172 (1999) ..... 4, 8, 9, 10, 15, 16

*Montana v. United States*,
450 U.S. 544 (1981) ..... 12

*Oneida Cty. v. Oneida Indian Nation*, 470 U.S. 226 (1985) ..... 4

*Plains Commerce Bank v. Long Family Land & Cattle Co.*,
554 U.S. 316 (2008) ..... 3

*Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392 (1968) ..... 7, 8, 9

*Puyallup Tribe v. Department of Game of Wash.*, 433 U.S. 165 (1977) ..... 7

*The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866) ..... 4

*Tulee v. Washington*, 315 U.S. 681 (1942) ..... 5, 7

*United States v. Shoshone Tribe*, 304 U.S. 111 (1938) ..... 4, 5

*United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ..... 10

*United States v. Washington*, 520 F.2d 676 (9th Cir. 1975) ..... 9

*United States v. Winans*, 198 U.S. 371 (1905) ..... 5, 6, 11, 16

*Ward v. Race Horse*, 163 U.S. 504 (1896) ..... 6, 13, 16

*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) ..... 5, 7, 8, 9

*Worcester v. Georgia*, 31 U.S. 515 (1832) ..... 3, 4

**Constitutional Provisions**

U.S. Const. art. VI, cl. 2 ..... 2

**Treaties**

Treaty with the Crows, May 7, 1868, 15 Stat. 649 ..... 1, 12

Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868, 15 Stat. 673 ..... 13

**Other Authorities**

*Cohen's Handbook of Federal Indian Law* (Nell Jessup Newton, ed., 2012) ..... 5

Akshara Menon & Matthew Penn, *American Indian and Alaska Native Hunting and Fishing Rights,* Centers for Disease Control and Prevention, Office for State, Tribal Local and Territorial Support, https://www.cdc.gov/phlp/docs/tribalhuntin g-brief.pdf (last visited Nov. 6, 2017) ..... 14

Alden Big Man Jr., *Crow History 1700-1950: A Political and Social Battle to Retain Their Culture,* Univ. of N.M. Digital Repository, July 2, 2011, http://digitalrepository.unm.edu/hist_etds/7 ..... 12

Angie Debo, *A History of the Indians of the United States* (1970) ..... 11

Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples' Subsistence Rights,* 58 Clev. St. L. Rev. 273 (2010) ..... 11

*2015 Annual Report A-3,* Wyoming Game and Fish Dep't, https://wgfd.wyo.gov/ WGFD/media/ content/PDF/About Us/ Commission/ WGFD_ANNUALREPORT_ 2015.pdf (last visited Nov. 6, 2017) ..... 9

*2016 Hunting Forecast – Game and Fish,* Wyoming Wildlife Fed'n (Aug. 5, 2016), http://wyomingwildlife.org/2016-hunting-forecast-game-and-fish/ ..... 9, 10

*2016 Annual Report of the Interagency Bison Management Plan*, Bison Management Plan, http://www.ibmp.info/Library/AnnualReports/2016_IBMP_AnnualReport_FINAL.pdf (last visited Oct. 25, 2017) ..... 14

*East of Yellowstone Lies the Absarokas-Crow Country*, The Human Footprint (March 2, 2011), http://thehumanfootprint.wordpress.com ..... 12

*Elk Hunting*, Wyoming Game & Fish Dep't, http://wgfd.wyo.gov/Hunting/Hunt-Planner/Elk-Hunting (last visited Nov. 6, 2017) ..... 9

Joseph Medicine Crow, *From the Heart of the Crow Country: The Crow Indians' Own Stories* xxi-xxii (1992) ..... 12

Letter from Chairman Joe Durglo, Confederated Salish and Kootenai Tribes, to Mont. State House of Representatives, House Agric. Comm. (April 22, 2013), http://leg.mt.gov/bills/2013/Minutes/House/Exhibits/agh76a02.pdf ..... 14, 15

*Tribal Hunting & Co-Management*, Wash. Dep't of Fish and Wildlife, http://wdfw.wa.gov/hunting/tribal/treaty_history.html (last visited Oct. 25, 2017) ..... 13

*Tribal Treaty Hunting Rights and Bison*, State of Mont. Dep't of Fish, Wildlife & Parks, http://fwp.mt.gov/fwpDoc.html?id=75713 (last visited Oct. 25, 2017) ..... 13

*We Are All Salmon People*, Columbia River Intertribal Fish Comm'n, http:/www.critfc.org/salmon-culture/we-are-all-salmon-people (last visited Oct. 25, 2017) ..... 11

## INTEREST OF AMICI CURIAE[1]

Amici, listed in the APPENDIX, are professors and scholars of Indian law. Amici are interested in the proper application of this Court's precedents relevant to Indian treaties and the Supremacy Clause of the United States Constitution. Amici believe that controlling decisions of this Court require application of specific legal rules developed in the area of federal Indian law for interpreting Indian treaties.

## SUMMARY OF THE ARGUMENT

Petitioner asks this Court to resolve fundamental questions about the scope of the off-reservation hunting rights reserved by the Crow Tribe of Indians, whose reservation in Montana borders Wyoming, in the Tribe's 1868 Treaty with the United States. The Treaty guaranteed to Petitioner and all other members of the Crow Tribe the "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Treaty with the Crows, art. 4, May 7, 1868, 15 Stat. 649.

The status of Indian treaties as the "supreme Law of the Land," their foundational role in our

---

[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* file this brief as individuals and not on behalf of the institutions with which they are affiliated. All parties received 10 days' notice before its due date of amici's intent to file this brief, and all parties have consented to its filing.

constitutional system, and two centuries of this Court's development and application of standards for reviewing and interpreting Indian treaties demand careful scrutiny before any state may infringe upon treaty rights. U.S. Const. art. VI, cl. 2. In addition, treaty-reserved rights to hunt, fish, and gather in ceded aboriginal territories remain central to the existence and identity of Indian tribes and their people. Certiorari is warranted to ensure that treaty-reserved rights retain their proper recognition within our constitutional system and are protected by this Court's jurisprudence.

## ARGUMENT

### I. Indian Treaties Establish the Foundations of Federal Indian Law.

Treaties made by and between the United States and Indian tribes form the foundation of the unique federal-tribal relationship and have helped define that relationship since this Court's earliest decisions. Although the Supremacy Clause, U.S. Const. art. VI, cl. 2, establishes the primacy of treaties as a legal matter, it was not until this Court began interpreting and applying that clause in the context of treaties between the United States and the Cherokee Nation that the import of Indian treaties became clear.

In *Cherokee Nation v. Georgia*, Chief Justice Marshall relied upon those treaties to support his designation of Indian tribes as both "nations," 30 U.S. 1, 16 (1831) ("The numerous treaties made with them by the United States recognize them as a people . . . responsible in their political character for any violation of their engagements."), and "dependent," *id.* at 17 ("They acknowledge

themselves in their treaties to be under the protection of the United States."). The characterization of Indian tribes as "domestic dependent nations," *id.* at 17, defines this Court's understanding of tribal status to the present day. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (citations omitted) ("Indian tribes are 'domestic dependent nations.'").

This Court's reliance on and interpretation of the Cherokee treaties also helped define the relationship between tribes and the federal government, and the authority of individual states. In the term following *Cherokee Nation*, the Court determined that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Worcester v. Georgia*, 31 U.S. 515, 557 (1832). Because the acts of the State of Georgia "interfere[d] forcibly with the relations established between the United States and the Cherokee nation" and were "in direct hostility with [those] treaties," the Court determined the state laws could "have no force" within Cherokee territory. *Id.* at 561. This Court continues to acknowledge tribes as separate and independent from states in its development of federal Indian law. *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) ("For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities.'" (quoting *Worcester*, 31 U.S. at 559)). It remains well established that treaties are a significant component in defining the federal relationship with Indian tribes

and insulate inherent Indian rights from state intrusion.

## II. The Indian Canons of Construction Protect These Foundations.

The Court has long recognized that because the terms and provisions of Indian treaties involve the reservation of lands, waters, and hunting and fishing rights on which Indian life depends, specific rules of treaty construction control their interpretation. *See, e.g., Worcester*, 31 U.S. at 551-57 (interpreting the Treaty of Hopewell in view of congressional policy to "treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate"). These fundamental maxims of interpretation, known as the Indian canons of construction, are "rooted in the unique trust relationship between the United States and the Indians." *Oneida Cty. v. Oneida Indian Nation*, 470 U.S. 226, 257 (1985). The Indian canons are "enlarged rules of construction," *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866), which ensure that "the language used in treaties with the Indians should never be construed to their prejudice." *Worcester*, 31 U.S. at 582.

There are three basic Indian canons employed by the Court. First, treaty language must be construed as the Indians would have understood it, and the rights reserved by treaties remain intact unless *Congress* has expressed clear and unambiguous contrary intent. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (*Mille Lacs*); *Jones v. Meehan*, 175 U.S. 1, 10-12 (1866); *United States v. Shoshone Tribe*, 304 U.S.

111, 116 (1938). Second, Indian treaties must be construed liberally in favor of the Indians. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible . . . in a spirit which generously recognizes the full obligation of this nation to protect the [Indian] interests."); *Antoine v. Washington*, 420 U.S. 194, 199 (1975) ("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." (citing *Worcester*, 31 U.S. 515)); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) (*Fishing Vessel*). Finally, ambiguities in the treaty language must be resolved in favor of the Indians. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973).

These interpretive rules reflect the Court's understanding that a "treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). The canons do not simply address a perceived inequality in bargaining power between tribes and the United States, but reflect accepted interpretive principles; thus they "do not turn on the ebb and flow of judicial solicitude for powerless minorities." *Cohen's Handbook of Federal Indian Law* § 2.02[2], at 118 (Nell Jessup Newton, ed., 2012). Indeed, the canons "have quasi-constitutional status; they provide an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation." *Id.* at 118-19.

## III. The Court Has Applied the Indian Canons of Construction to Limit State Authority Over Indians Exercising Reserved Treaty Rights to Hunt and Fish Off-Reservation

The exercise by an individual Indian of rights reserved in a treaty can lead to conflict with state authority, particularly where the Indian seeks to exercise a reserved right to hunt or fish away from the tribal member's reservation. With the exception of its decision in *Ward v. Race Horse*, 163 U.S. 504 (1896), the Court has resolved these conflicts by applying the Indian canons of construction to insulate tribal treaty rights from state regulation except in narrow and specific circumstances.

In 1905, the Court began a long tradition of resolving conflicts related to the off-reservation exercise of rights by Indians in the Northwest by employing the canons of construction. It carefully considered the context in which the treaty was negotiated and construed treaty language as the Indians would have understood it. *Winans*, 198 U.S. at 380-81. The Court recognized that the right to use traditional fishing locations was "part of larger rights possessed by the Indians," and that the "form of the [treaty] and its language was adapted" to preserve the exercise of those rights. *Id.* at 381. Despite the treaty language securing Indian rights "*in common* with the citizens" of the territory, the Court concluded that the treaty "seemed to promise . . . and give the word of the nation for more" than just allowing Indians to exercise the same rights as other citizens of the state, rights they would have had in the absence of the treaty. *Id.* at 379-80. The Court

also rejected the argument that the reserved rights were abrogated by admission of the State of Washington to the Union. *Id.* at 382-84.

The Indian canons of construction continued to play a central role in the Court's resolution of subsequent cases involving similar conflicts between the exercise of off-reservation treaty rights and the authority of the State of Washington. In *Tulee*, the Court considered Washington's conviction of a member of the Yakima tribe for failure to obtain a state license to fish. 315 U.S. at 682. "Viewing the treaty in [ ] light" of the canons requiring liberal construction and an understanding of the language as the Indians would have understood it, the Court determined that the "state is without power to charge the Yakimas a fee for fishing" because the state's licensing requirement could not "be reconciled with a fair construction of the treaty." *Id.* at 685.

In a series of cases following *Winans* and *Tulee*, the Court defined the balance between off-reservation treaty rights and state authority to regulate the exercise of those rights. The Court ruled that state regulatory authority is limited to that necessary for the conservation of a species, and it may not discriminate against Indians exercising treaty rights. *See Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392 (1968) (*Puyallup I*); *Department of Game of Wash. v. Puyallup Tribe*, 414 U.S 44 (1973); *Antoine*, 420 U.S. 194; *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977); *Fishing Vessel*, 443 U.S. at 675-76. In these cases, the Court analyzed the relevant treaty or other agreement in accordance with the canons of

construction. *E.g.*, *Puyallup I*, 391 U.S. at 397-98 ("It is in th[e] spirit [of liberal treaty construction] that we approach these cases."); *Antoine*, 420 U.S. at 199-200; *Fishing Vessel*, 443 U.S. at 675-76.

Most recently, the Court reiterated the importance of the Indian canons of construction in *Mille Lacs*. There, the Court relied upon the canons to preserve a tribe's off-reservation rights to hunt, fish, and gather secured in an 1837 treaty despite a subsequent Executive Order purporting to revoke those rights, cessions by the tribe in a subsequent treaty, and the Act of Congress admitting Minnesota to the Union. 526 U.S. at 175-76. Central to the Court's treaty interpretation was the requirement that courts "look beyond the written words to the larger context that frames the Treaty," which "sheds light on how the [Indian] signatories to the Treaty understood the agreement." *Id.* at 196. This contextual understanding must come from "an analysis of the history, purpose, and negotiations of *this Treaty*," and may not be drawn from analogies to or reliance upon judicial interpretation of other agreements with similar language. *Id.* at 202. An argument that "similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of the basic principles of treaty construction." *Id.*

The *Mille Lacs* Court also confirmed the strict limits on state regulation of the exercise of off-reservation treaty rights, stating: "[w]e have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing and gathering

rights in the interest of conservation." *Id.* at 205 (citing *Puyallup I*, 391 U.S. at 398; *Fishing Vessel*, 443 U.S. at 682; *Antoine*, 420 U.S. at 207-08). The Court confirmed that state authority over Indians exercising treaty rights is available only as a last resort because, absent established conservation-necessity, Indian treaty-hunters have "the right to hunt . . . free [from] state regulation, a privilege that others [do] not enjoy." *Id.* at 204; *see also Antoine*, 420 U.S. at 207 (to regulate treaty-hunting, a state "must demonstrate that its regulation is a reasonable and necessary conservation measure *and* that its application to the Indians is necessary" (citations omitted)); *United States v. Washington*, 520 F.2d 676, 686 & n.3 (9th Cir. 1975) (unless a state has demonstrated that conservation necessity requires "*application to the Indians*" of a state hunting or fishing regulation,"[t]he state must pursue its goals as best it can by regulating its own non-treaty . . . citizens" (emphasis added)).[2]

---

[2] Here, the lower court did not reach the issue of conservation necessity, Order of Apr. 27, 2017, at 13 n.7; however, ample publicly available evidence demonstrates the lack of any need to regulate Indian treaty hunters to conserve the elk population in Wyoming. *See, e.g.*, *2015 Annual Report* A-3, Wyoming Game and Fish Dep't, https://wgfd.wyo.gov/WGFD/media/content/PDF/AboutUs/Commission/WGFD_ANNUALREPORT_2015.pdf (last visited Nov. 9, 2017) ("Overall, the Department continues management strategies to reduce Wyoming elk numbers."); *Elk Hunting*, Wyoming Game & Fish Dep't, https://wgfd.wyo.gov/Hunting/Hunt-Planner/Elk-Hunting (last visited Nov. 6, 2017) (limiting an applicant to no more than three elk licenses in any one calendar year); *2016 Hunting Forecast – Game and Fish*, Wyoming Wildlife Fed'n (Aug. 5, 2016), http://wyomingwildlife.org/2016-hunting-forecast-game-and-

The Indian canons of construction are essential aspects of this Court's Indian law jurisprudence and necessary for ensuring that treaties and the rights reserved therein are given due consideration and protection. As yet, no court has interpreted the Crow Treaty in accordance with this Court's guidance in *Mille Lacs*, and certiorari is warranted to ensure that the Indian canons of construction are properly considered and applied in this matter.

## IV. The Indian Canons of Construction Also Serve to Protect Important Aspects of Tribal Identity.

Treaty-reserved rights to hunt and fish, like those asserted by Petitioner, are fundamental aspects of tribal culture, society, and daily life, just as they have been since before the treaties were entered. As Judge Boldt noted in his landmark 1974 decision regarding tribal fishing rights in the State of Washington, those rights protect "the means of economic livelihood and the foundation of native culture," and "[r]eservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farm lands, compulsory education, technical assistance and pecuniary rewards offered in the treaties." *United States v. Washington*, 384 F. Supp. 312, 406-07 (W.D. Wash. 1974). Judge Boldt's findings followed this Court's reasoning more than a

---

fish/ ("All elk herds surrounding the Bighorn Basin, with the exception of the Crandall/Sunlight herd, are above [the population] objective. That includes the northern Bighorn Mountains . . .").

century ago that these activities and their protection were "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Winans*, 198 U.S. at 381-82. Off-reservation usufructuary rights remain essential to the very identity of the tribes and tribal people who exercise them today. *See, e.g.*, *We Are All Salmon People*, Columbia River Intertribal Fish Comm'n, http://www.critfc.org/salmon-culture/we-are-all-salmon-people/ (last visited Oct. 25, 2017); Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples' Subsistence Rights*, 58 Clev. St. L. Rev. 273, 276 (2010) (subsistence resources "are not just food for the body, but also 'spirit food'").

For the Crow Tribe, retaining off-reservation rights was a matter of survival. Descriptions of Crow lands circa 1830 and shortly after the 1868 Treaty was signed reveal a self-sufficient people living in a country containing bountiful resources, which amply satisfied Crow people and impressed non-Indian visitors. *See, e.g.*, Angie Debo, *A History of the Indians of the United States* (1970), at 284-85.[3] As

---

[3] Debo relied upon Hugh Lenox Scott's description of a Crow village in 1877 in which he "found the Crows 'rich in everything an Indian required to make him happy.'" Debo, *supra* at 284. Several decades earlier, Crow Chief Arapooish (or Sore Belly) had expressed complete contentment with his home:

> The Crow country is a good country. The Great Spirit has put it in exactly the right place. . . . There you can hunt the elk, the deer, and the antelope, when their skins are fit for dressing; there you will find plenty of white bears and mountain sheep. . . . [T]here you will find buffalo meat for yourselves . . . Everything good is

the majority of this Court noted in *Montana v. United States*, "at the time of the [1868] treaty, the Crows were a nomadic tribe dependent chiefly on buffalo." 450 U.S. 544, 556 (1981). Non-Indian settlement, however, diminished game populations, significantly impacting the Crow way of life. By 1868 there was "clear recognition by the United States that the traditional mainstay of the Crow Indians' diet was disappearing." *Id.* at 572 (Blackmun, J., dissenting). To compensate for the loss of natural resources found on lands the Crow ceded to the United States, the Tribe expressly retained in Article 4 the "right to hunt on the unoccupied lands of the United States," thus preserving their ability to access game and maintain their existence. Treaty with the Crows, art. 4, 15 Stat. at 650.[4]

The exercise of these rights remains central to tribes and their members. Petitioner went hunting in January 2014 to put elk meat on the table for his

---

to be found there. There is no country like the Crow country.

Joseph Medicine Crow, *From the Heart of the Crow Country: The Crow Indians' Own Stories* xxi-xxii (1992); *see also East of Yellowstone Lies the Absarokas-Crow Country*, The Human Footprint (Mar. 2, 2011), http://thehumanfootprint.wordpress.com/2011/03/02/east-of-yellowstone-lies-the-absarokas-crow-country; Alden Big Man Jr., *Crow History 1700-1950: A Political and Social Battle to Retain Their Culture*, Univ. of N.M. Digital Repository, July 2, 2011, http://digitalrepository.unm.edu/hist_etds/7.

[4] As Petitioner notes, many other tribes across the American West and in the Great Lakes region reserved usufructuary rights in their treaties to ensure the continuation of their lifeways. Pet. Brief at 28-29.

family and members of his community, as the Crow have done since time immemorial. Pet. Brief at 29. Though Petitioner's hunt began in Montana, his pursuit of elk took him into Wyoming; however, many tribal members often travel outside of their reservations and sometimes across state lines to exercise treaty rights within their aboriginal territories for subsistence hunting purposes. *See, e.g.*, *Tribal Hunting & Co-Management*, Wash. Dep't of Fish & Wildlife, http://wdfw.wa.gov/hunting/tribal/treaty_history.html (last visited Oct. 25, 2017) (24 tribes have off-reservation hunting rights in the State of Washington, including two tribes located outside of the state). In Montana, a number of tribes from across the region, including the Shoshone-Bannock Tribes whose treaty rights in Wyoming were the subject of *Race Horse*, 163 U.S. at 507; *see* Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868, 15 Stat. 673, continue to hunt wild bison on unoccupied lands near Yellowstone National Park. *See FAQ on Tribal Treaty Hunting Rights and Bison*, State of Mont. Dep't of Fish, Wildlife & Parks, http://fwp.mt.gov/fwpDoc.html?id=75713 (last visited Oct. 25, 2017) (listing the Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Salish and Kootenai Tribes, Montana; Nez Perce and Shoshone-Bannock Tribes, Idaho; and Confederated Tribes of the Yakama Nation, Washington, as having "demonstrated treaty rights to hunt bison in Montana and . . . now hunting bison in Montana.") In 2016, consistent with the terms of their treaties and the mutually agreed-upon terms of harvest established through the Inter-Agency Bison

Management Plan, these tribal hunters harvested more than 350 bison from unoccupied lands just across the Wyoming-Montana border to the north and west of Yellowstone National Park. *2016 Annual Report of the Interagency Bison Management Plan*, Interagency Bison Management Plan, *available at* http://www.ibmp.info/Library/AnnualReports/ 2016_ IBMP_AnnualReport_FINAL.pdf (last visited Oct. 25, 2017).

Reserved "[h]unting and fishing rights are significant in a public health context because many tribal communities rely upon these traditional foods for subsistence." Akshara Menon & Matthew Penn, *American Indian and Alaska Native Hunting and Fishing Rights*, Centers for Disease Control and Prevention, Office for State, Tribal Local and Territorial Support, https://www.cdc.gov/phlp/docs/ tribalhunting-brief.pdf (last visited Nov. 6, 2017). Had the Crow and other tribes not reserved these rights in their treaties and had the rights not been protected by the decisions of this and other courts, tribal members would have lost important property rights that contribute to cultural preservation and help sustain healthier tribal communities. Any infringement on a tribe's ability to exercise retained treaty rights harms their unique connections to their traditions and the natural world, connections that, although different for each tribe, are integral to tribal existence itself. *See, e.g.*, Letter from Chairman Joe Durglo, Confederated Salish and Kootenai Tribes, to Mont. State House of Representatives, House Agric. Comm. (April 11, 2013), http://leg.mt.gov/bills/2013/Minutes/House/ Exhibits/ agh76a02.pdf ("The buffalo remains a key component

of our culture today, and preserves a connection to tribal traditions that date back uncounted generations . . . . [T]he Tribes reserved the right to hunt and fish [in the 1855 Treaty of Hellgate] . . . [and o]ur tribal members have a long history of hunting the buffalo . . . [;] we continue to rely on their meat, hides, and other parts to sustain us physically and spiritually.").

The continuing "physical[ ] and spiritual[ ]" sustenance ensured by treaty rights demands more protection than the vicissitudes of varying state legislative and regulatory priorities. *Id.* Diverging from the majority position that national forest lands are "unoccupied" or "open and unclaimed" lands, *see* Pet. Brief at 24-25, the decisions below render tribal citizens, including Petitioner, other members of the Crow Tribe, and members of the Shoshone-Bannock Tribes, subject to all state laws when hunting in Wyoming even though they are free from state regulation when exercising the same rights in the national forest lands of neighboring states. According to this Court's Indian canons precedent, treaty rights require uniform application and must not depend on state boundaries, absent congressional action expressly requiring such limitation or demonstrated conservation necessity. *Mille Lacs*, 526 U.S. at 205. The absurd result of the decisions below demonstrates the consequences of impliedly abrogating treaty rights in contravention of this Court's guidance concerning treaty interpretation. *See id.* at 202; *compare id.* at 205 ("[S]tatehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries."), *with Race Horse*, 163 U.S. at 514

("[R]epeal [of the treaty-reserved rights] results from the conflict between the treaty and the act admitting [Wyoming] into the Union," even though the latter act was silent as to treaty rights.). Like the elk that Petitioner pursued from Montana into Wyoming, the rights reserved by Indian tribes in treaties with the federal government are not limited by state boundaries. Certiorari is required to abate this unlawful outcome and ensure that the Crow Treaty is duly interpreted according to the Indian canons of construction. *See Mille Lacs*, 526 U.S. at 196-203.

## CONCLUSION

For nearly 200 years, this Court's interpretation of the solemn guarantees made in Indian treaties acknowledged the rightful supremacy of those promises in our constitutional framework. This Court has faithfully and repeatedly protected the tribal rights reserved in those treaties from unjustified abrogation and improper subjugation to state authority. Such protection is mandated not only by the supremacy of federal treaties under the Constitution but by justice itself. *See, e.g., Winans*, 198 U.S. at 380-81 (applying the canons of construction to "counterpoise the inequality" of treaty negotiations and observing that the "negotiations and a convention . . . seemed to promise more, and give the word of the nation for more" than the mere "rights . . . that any inhabitant of the territory or state would have"); *cf. Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word.").

The decision below is inconsistent with the well-established Indian canons of construction, with the Court's standards for abrogating a treaty right, and ultimately with the United States Constitution. Ignoring a century of Supreme Court decisions, Wyoming instead followed the single set of faded hoof prints left in 1896 by *Race Horse*. Although the courts below also found support from the Tenth Circuit's decision in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), which took a similar route, this Court's *Mille Lacs* decision in 1999 plainly put both *Race Horse* and *Repsis* out to pasture. Wyoming's failure to follow this Court's most recent precedent on the matter has denigrated the Crow Tribe's federal treaty rights and resulted in an unjust criminal conviction. Certiorari is necessary to correct these errors and to protect the unabrogated rights retained by the Crow Tribe in the Treaty of 1868.

Respectfully submitted,

MONTE MILLS
*Counsel of Record*
Assistant Professor
ALEXANDER BLEWETT III
SCHOOL OF LAW AT THE
UNIVERSITY OF MONTANA
Missoula, MT 59812
(406) 243-2544
monte.mills@umontana.edu
*Counsel for Amici Curiae*

November 8, 2017